IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.445 OF 1990

SHRI B.S. RAWAT
Asstt. Collector of
Customs (P) R & I,
Prosecution Cell,
New Customs House,
Ballard Pier
Bombay 400 038. ...Appellant.
(Orig.Respondent No.1
in the Sessions Court
Appeal)

V/s

1. SHRI SHRIKRISHNA KESHAV
SARPOTDAR, residing at
Block No.9, Puspa Building
No.2, Mahant Road Extension, ...Respondents.
Vile Parle (East), (Respondent No.1 -
Bombay. 400 057. Orig. Appellant

And

2. THE STATE OF MAHARASHTRA Respondent No.2
-Orig. Respondent
No.2 in the Sessions
Court Appeal)

Mr. J.C. Satpute, Advocate for the appellant.

Mr. K.Y. Mandlik, advocate for respondent No.1.

Mr. D.P. Adsule, APP for respondent No.2 - State.

CORAM: V.M.KANADE,J.

DATE: 1st October, 2004

ORAL JUDGMENT: (Per V.M. Kanade, J.)

1. Appellant - Assistant Collector of Customs (P) R & I, Prosecution Cell, has filed the present appeal against the judgment and order passed by the Court of

sessions for Greater Bombay in Criminal Appeal No.190 of 1982 whereby the Sessions Court allowed the appeal filed by the respondent No.1 and acquitted him of the charges levelled against him.

2. A complaint was filed against the respondent by the Assistant Collector of Customs under section 135(1)(a) read with section 135(1)(i) of the Customs Act, 1962. The respondent - accused was convicted under the said sections and sentenced to suffer R.I. for one year and was directed to pay fine of Rs 10,000/- and, in default of payment of fine, to suffer R.I. for six months. Against the said order passed by the Additional Chief Metropolitan Magistrate, respondent - accused preferred an appeal which was allowed by the Sessions Court.

3. The case of the prosecution was that on 22/2/1976 one Ground Hostess working with Kuwait Airways was attending the counter of Kuwait Airways. Alongwith her, one Mrs. Daruwalla was working as Ground Hostess at the adjoining counter. At about 6.30 or 6.45 p.m., accused came to the counter of Mrs. Umrigar and gave his baggage for checking . Mrs Umrigar, however, asked the accused to go to Mrs. Daruwalla. She found that though the Flight Coupon showed that there was

only one piece of baggage of the weight of 13 Kgs., in fact, the accused was carrying three bags. Accused, therefore, corrected the Flight Coupon showing two pieces of baggage of 20 Kgs. This fact was reported to the Station Manager, Kuwait Airways who became suspicious. One Mr. Ganpati who was the Intelligence Officer also had heard the conversation between Mrs Daruwalla and the accused. Thereafter, further investigations were made by the concerned Officer and he found that two suitcases were unclaimed and that the Flight of Kuwait Airways had departed. Thereafter, suitcases were removed for further examination and it was found that in one suitcase there were two plastic bundles containing snake skins alongwith some precious stones like diamonds, cut diamonds, diamond jewellery etc. in three brown papers. Thereafter, the accused was brought to the Airport and his statement was recorded under section 108 of the Customs Act. He admitted to have committed the said offence in the said statement. The accused retracted his confessional statement by filing written submissions in the Court of Metropolitan Magistrate. I have perused the evidence of the prosecution witnesses with the assistance of Shri Satpute, the learned Counsel appearing on behalf of the appellant.

4. It is an admitted position that the accused was not on duty and also was not in an uniform on the date of the incident. His statement under section 108 was initially recorded and, thereafter, the statements of other witnesses were recorded by the prosecution. From the perusal of the evidence of Mrs. Umrigar - P.W.13 and Mrs. Daruwalla - P.W.3, it can be seen that there are number of contradictions. Apart from that, Mrs. Daruwalla has admitted in the cross-examination that when Mr. Bangera - P.W.4 came to the counter, she did not have any conversation with him. However, she had a talk with Mr. Bangera after the statement of the accused was recorded under section 108. Secondly, there is an apparent contradiction in her statement. On the one hand, she states that P.W.1 - Ganpati was present when her statement was recorded and, on the other hands, she has stated that she had no conversation with Mr. Bangera at the time of the incident, though, in the same breath, she has further stated that she had given the description of the accused to Mr. Bangera. From the evidence of Mrs. Umrigar - P.W.13, it can be seen that when the accused first approached her, she was busy attending other passengers and she asked the accused to meet Mrs. Daruwalla who was on the other counter.

5. From the evidence of these two witnesses, it is apparent that both of them did not know the name of the accused and had seen the accused at the counter. Therefore, it is difficult to accept the prosecution's case that these two witnesses were in a position to give any kind of information on the basis of which the accused could be apprehended and caught. Secondly, their statements also have been recorded after the confessional statement of the accused under section 108 of the Customs Act was recorded. From the evidence of P.W. 1 - Ganpati, it can be seen that he did not know the identity of the person who had approached Mrs. Daruwalla and Mrs. Umrigar. This witness has further stated that Mr. Bangera had told him that one person working in Air India had approached their counter alongwith the suitcases and he had written on the coupon the weight of one suitcase though he had given two suitcases. From his evidence, it can also bee seen that he had no idea regarding the identity of the accused as the information was based on what was told to him by Mr. Bangera, who, in turn, was informed about the accused by Mrs. Daruwalla and Mrs. Umrigar who, admittedly, did not know the name of the accused. Thus, it is difficult to imagine as to how P.W.1 - Ganpati could

establish the identity of the accused.

6. From the evidence on record, all that is found is that after initial encounter of the accused with two Ground Hostesses i.e. P.W.13 - and P.W.3, he was not seen at the said place and that two suitcases were found unclaimed and from the search of one suitcase the alleged contraband was found. The finding of the Sessions Court, therefore, that there was no material on record from which it can be gathered that the witnesses knew the identity of the accused cannot be found fault with. P.W.1 - Ganpati has admitted in his evidence that nobody had given him physical description of the accused. The Sessions Court, therefore, in my view, has rightly come to the conclusion that there was absolutely no evidence available with the Customs Authorities on the basis of which they could come to the conclusion that the respondent No.1 - accused had committed the said offence in order to apprehend him on the very same day. Prosecution has also examined P.W.4 Bangera. From his evidence also, it can be seen that no passenger had reported for any missing baggage. The Sessions Court has further observed that so far as P.W. 4 - Bangera is concerned, the Metropolitan Magistrate had permitted him to refresh his memory and

had permitted him to go through his previous statement. The Sessions Court has observed that this was highly improper and irregular as the previous statement could never be allowed to be used either for refreshing the memory or for corroborating the evidence which was being given by the witness. Sessions Court, in my view, therefore, has rightly disbelieved this witness and has observed that this serious lapse in procedure which is committed by the Metropolitan Magistrate has adversely affected the conduction of the trial. The only evidence, therefore, which was available to the prosecution was the statement which was recorded under section 108 of the Customs Act. The Apex Court has consistently taken a view that it was open for the Court to convict the accused on his confession though it was retracted at the later stage. However, the Court should also try to see whether there is any further corroboration to the confessional statement before convicting the accused on such statement. Prosecution has recorded two statements of the accused under section 108 of the Customs Act. The first statement was recorded on 22/2/1976 and the second statement was recorded on 3/3/1976 in the Office of Superintendent of Arthur Road Jail. The second statement does not contain any inculpatory confession. The Trial Court, therefore,

relied on the first statement which was recorded on 22/2/1976. From the evidence, it appears that this statement was recorded after the accused was interrogated for eight hours. There is no evidence to suggest that sufficient time was given to the accused to consider the effect of his statement. Thus the possibility of the said statement being recorded voluntarily becomes very bleak. In the present case, the accused was arrested at 11.00 a.m. However, he was interrogated in the evening after atleast six hours. The accused in his statement retracted his confession and has stated that the accused was threatened that he would be detained under COFEPOSA Act. It is an admitted position that, later on, in fact, the accused was detained under COFEPOSA Act and he has undergone the entire sentence during such detention. The Trial Court had convicted the accused and had sentenced him to suffer R.I. for one year. The appellate court acquitted the accused of the said offence. The fact remains that the accused has been in custody and was detained under COFEPOSA Act for one year. In a sense, he has already undergone the said conviction though it may not have been undergone under the Customs Act. The incident in question has taken place in 1976. The accused has already retired. Under these circumstances, I do not see any reason to

interfere with the order of acquittal passed by the Sessions Court. Accordingly, the following order is passed:-

O R D E R

. There is no reason to interfere with the order dated 21.10.1988 passed by the Sessions Court. The accused has already undergone sentence of one year. Thereafter, he was also detained under the provisions of the COFEPOSA Act. The incident in question has taken place on 22nd February 1976. The appeal filed by the Customs Department for enhancement of sentence before this Court, being Criminal Appeal No.330 of 2002 has also been dismissed by order dated 8th January 1990. In view of these circumstances, there is no reason to interfere with the order passed by the Lower Appellate Court. Appeal is dismissed. The amount which was seized from the respondent be returned and amount of fine be also returned without interest.

V.M. KANADE J.